No. 97-372

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE AMOCO CHEMICAL COMPANY IN SUPPORT OF RESPONDENT UNITED STATES SHOE CORPORATION

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STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Amoco Corporation, having its principal place of business in Chicago, Illinois, is a manufacturer of a wide

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[1] This brief was drafted entirely by counsel for *amicus curiae* Amoco Chemical Company without assistance, monetary or otherwise, from counsel for either party.

variety of hydrocarbon based products including motor fuel and other fuels, refined petrochemical and natural gas products and semi-finished chemical products. Among its activities, Amoco Corporation, including its subsidiary Amoco Chemical Company (hereinafter "Amoco"), (plaintiff in a related refund case currently stayed before the United States Court of International Trade), exports, imports and ships in coastal traffic substantial quantities of materials subject to the Harbor Maintenance Tax ("HMT"). Amoco exports large quantities of such products as styrene, which is a basic building block chemical for the production of polystyrene plastic resins, and purified terephtalic acid "PTA", a major raw material for the production of polyester resins. Amoco utilizes intercoastal shipping in the United States for shipping intermediate and finished goods to and from its various refineries and distribution points located throughout the country. In addition, Amoco imports substantial quantities of crude oil which is subject to the HMT. To date, Amoco has paid millions of dollars in HMT on exports, imports and coastwise traffic.

Amoco has reviewed in depth and fully supports the basic arguments on constitutionality offered to this Honorable Court in the brief filed by Respondent, United States Shoe Corporation. In the interests of judicial economy, Amoco will not repeat those arguments in this brief. At the same time, Amoco believes that this brief may offer an insight to the Court relative to how the economic concerns of the Framers supporting the prohibition of a tax on exports are as dynamic and significant in international commerce today, as they were at the time the Constitution was being drafted.

As a major United States exporter, Amoco is sensitive to the importance of maintaining a strong industrial base in this country. Amoco also understands the nature of competitive conditions in world markets. It is fundamentally inconsistent with the economic interests of the United States for any tax to be assessed on exported merchandise. This, we believe, was fully recognized in 1789 when the Founding Fathers debated, and finally approved, a Constitution that expressly prohibits the establishment of such a pernicious tax.

In practical terms, Amoco is competitively disadvantaged by the harbor maintenance tax. The present amount of the tax, when aggregated, is a significant factor affecting the profitability of many export businesses. Indeed, the tax could easily affect whether a company would enter into an export transaction, given the extremely competitive world wide market conditions under which commodity chemical products are sold at historically low profit margins. In the case of Amoco, the assessment of the HMT is another factor facing Amoco in fulfilling its export marketing strategies. No exporter should have to contend with government-established disincentives to export business.

Amoco is convinced that the Drafters of the Constitution envisioned that a tax, such as the Harbor Maintenance Tax, should not be instituted by the Federal Government. Clearly, the assessment is by its own definition and character a tax, and not merely a fee, as argued by the Government. The history of the Framers' debates on the Export Clause demonstrate that they intended to enact the Clause because of its sound economic underpinnings. Because the tax impinges

directly on Amoco's ability to compete in the critical export markets of the world, the constitutionality of the tax is of great importance to it.

STATEMENT OF CONSENT

Amicus Curiae Amoco Chemical Company has obtained the consent of both parties to the filing of this brief in support of respondent United States Shoe Corporation, as indicated in the enclosed letters.

SUMMARY OF ARGUMENT

A primary intent of the Framers in enacting the Export Clause was clearly to avoid a factional conflict between the exporting Southern states and the majority Northern states. Concerns were also expressed in the Constitutional Convention that the power to tax exports would be exercised improperly if granted to the national government. In addition to those primary concerns, the Framers clearly considered and understood the advanced (for the day) economic rationale that eliminating taxes on exports would operate to the greater benefit of the country as a whole. Those concerns remain valid today, especially in view of the highly integrated nature of the international and domestic economies.

As one of the few restraints on the Congressional power to tax, the Export Clause should be staunchly defended against surreptitious incursions such as the tax before the Court. The Harbor Maintenance Tax ("HMT") is an *ad valorem* tax laid upon the value of exported cargo. A more clear example of a tax on exports is difficult to

envision. Congress should not be permitted to make such an obvious encroachment upon the clear terms of the Constitution.

Practically speaking, if the HMT is allowed to stand as written, and if the Government's arguments are taken to their necessary conclusions, Congress would be essentially unimpeded from taxing exports for any other purpose it can devise, either by inventing a "connection" between exports and the "service" being provided, or by increasing the tax rate to a level even more disproportionate in relation to the service provided than is currently the case. If the Court should approve the HMT in its current form as the Government argues, there would be essentially no upper limit on how high Congress could tax exports, because the current rate of taxation bears no relation to the costs of the purported benefits being provided. Indeed, the tax each year raises approximately 133% of the cost of the purported benefits, and that ratio is growing each year.

Projections from the *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* ("Annual Report") show that, at average levels of increase, the HMTF will have an accumulated surplus of $6.5 billion in 2005, $14.5 billion in 2010, and over $57 billion in 2020. This shows that the Framers were correct to be wary of taxes on exports, however small. Once a tax has been established, it inevitably grows, as will the progressively accumulating surplus in the HMTF.

ARGUMENT

I. The Framers Intended That The Federal Government Be Prohibited From Establishing Taxes or Similar Burdens on Export for Sound Economic Reasons that Remain Valid Today

Article 1, Section 9, Clause 5 of the Constitution provides that "No Tax or Duty shall be laid on Articles exported from any State." This clause formed an essential part of the political compromise necessary for ratification of the Constitution. After the Declaration of Independence, the states joined together under the Articles of Confederation. But because the Articles lacked a strong central authority, states with seaports discriminated against other non-port states by charging duties on goods shipped out of state.[2] Many states passed tariff laws to benefit themselves at the expense of neighboring states.[3]

The Export Clause compromise was essential to the adoption of the Constitution, for it removed a power from the states which they had abused, and prevented the Federal Government from exercising a power that had a great danger of abuse. *See*, L. Abramson, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C.L.Rev. 59, 60-63 (1976). The Southern states

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[2] *See, The Federalist Papers*, Federalist No. 42, at 305 (B. Wright, ed. 1961) (A. Hamilton); *see also*, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283-5 (1976).

[3] Editor's Introduction to *The Federalist Papers*, Penguin Books, (I. Kramnick, ed 1987), at 20.

were concerned that if the Northern states had control over the Federal Government they would tax exported products, which were the South's main source of revenue. In addition, concerns were expressed that the power to tax exports would be exercised improperly if granted to the national government. Both policies must be vindicated in any review under the Export Clause. *Fairbank v. United States*, 181 U.S. 283, 292 (1901) (prohibition applies not only to prevent discrimination among the states, but also to prevent the Federal Government from imposing an *ad valorem* tax on all exports).

A principal concern was that the Northern states would impose duties on exported goods, which were a major source of income for the Southern states. This concern was equal in importance for the Southern states to their fears that the new Constitution would outlaw slavery. At the Constitutional Convention, Gen. Pickney, delegate of South Carolina, issued a warning just before the convention delegates were to turn over their agreed-upon resolutions to the Committee of Detail that "If the committee should fail to insert some security to the Southern states against an emancipation of slaves and taxes on exports, I shall be bound by my duty to my state to vote against their report." 2 *Records of the Federal Convention* 95 (M. Farrand ed. 1934). The Committee on Detail returned a draft text that included a prohibition on taxes on exports, which was approved after extended debate. *Id.*, at 183.

Several attempts to change the text of the Clause demonstrate the true intent of the Framers. During the debate of the clause one delegate attempted to insert the

words "for purposes of revenue," after the word "duty" in the text of the Export Clause, but his motion was voted down. 2 *Records of the Federal Convention* at 363. By rejecting that restriction the Framers showed that export taxes or duties were intended to be prohibited for whatever reason, whether for purposes of revenue or not. The Framers did not care if the tax was a "fee for service" or an *ad valorem* duty: both were prohibited.

The restriction on taxing exports was arguably even meant to avoid paying for expenses associated with exports. James Madison noted that the exporting states wished to retain the power to lay duties on exports "to enable them to pay the expenses incurred." 3 *Records of the Federal Convention* at 328-29. This proposal was rejected following agreement to the Import-Export Clause, which, as discussed in Respondent's Brief, allows duties or taxes in very limited circumstances. Therefore, taxes on exports, *even to pay for expenses incurred by states on behalf of exporters* were intended to be prohibited by the Framers, except as provided in the Import-Export Clause.

In addition to the political reasons for the Export Clause, the Framers understood that taxing exports was a dangerous though attractive power that should be curbed, because many states had imposed such taxes under the Articles of Confederation. Some delegates were concerned that the power to tax exports would be exercised improperly if granted to the national government. 2 *Records of the Federal Convention* at

308 (Statement of Mr. Sherman). Oliver Ellsworth, delegate from Connecticut, argued that,

> There are solid reasons agst. Congs taxing exports. 1. it will discourage industry, as taxes on imports discourage luxury. 2. The produce of different States is such as to prevent uniformity in such taxes. there are indeed but a few articles that could be taxed at all; as [tobacco] rice & indigo, and a tax on these alone would be partial & unjust. 3. The taxing of exports would engender incurable jealousies.

2 *Records of the Federal Convention*, at 360. In broadsheets covering and discussing the Constitutional Convention, taxing exports was condemned as "the acme of impolicy."[4]

We believe that if the Framers had been presented with the HMT, they would have condemned it as vehemently as they condemned state taxes on exports while drafting the Constitution. It has all the pernicious aspects of those earlier taxes on exports. The Framers inserted the Export Clause in the Constitution to prevent the types of rivalries that are now developing due to a loss of business by certain U.S. ports to Canadian and Mexican ports, in

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[4] "Reply to Mason's 'Objections': Civis Rusticus," Virginia Indep. Chronicle, Jan. 30, 1788, *reprinted in*, Part One, *The Debate on the Constitution*, (Library of America, New York, 1993) at 361; *see also*, "Answers to Mr. Mason's Objections to the New Constitution," "Marcus" (James Iredell), Norfolk and Portsmouth Journal, March 19, 1788, *reprinted in*, Part One, *The Debate on the Constitution*, at 394-95.

order to pay for improvements made in ports farther away from our neighbors. *See*, 141 Cong. Rec. E519 (extension of remarks, March 6, 1995)(Rep. McDermott); "Ports Try Tax Breaks To Reel In Business," *Journal of Commerce*, April 6, 1995, at 1A, 8A. Because the HMT so closely matches the Framers' concerns, the Court must reject the Government's arguments and find that the HMT, as applied to exports, is an unlawful "tax or duty".

II. Establishment of the HMT and Increasing the HMT Rate, was Precisely What the Framers Intended to Prevent With the Export Clause

Congress passed the bill containing the Harbor Maintenance Tax as part of a larger political compromise on one of the largest water project authorization bills ever: the Water Resources Development Act of 1986 ("WRDA"), P.L. 99-662, 100 Stat. 4082 (November 17, 1986). The WRDA authorized funds for hundreds of water projects that had been bottled up in Congress for almost ten years, including mostly non-harbor dredging projects. *See*, P.L. 99-662, Titles II-VI, 100 Stat. at 4089-4149, for a list of over two hundred water projects authorized by the WRDA. But aside from imposing the HMT on shippers, the WRDA imposed no new regulations on vessels or shippers.

When no one objected strenuously to the new tax (because it was very low and the Government did not enforce the tax on exports), the Administration and Congress took the opportunity to more than triple the tax, while at the same time assuring a tidy surplus, which could be counted as an effort toward reducing the federal budget deficit. The HMT was increased from 0.04 percent of

cargo value to 0.125 percent by the Revenue Reconciliation Act of 1990, which was included in the Omnibus Budget Reconciliation Act of 1990 ("OBRA"), P.L.101-508, 104 Stat. 1388 (Nov. 5, 1990). Unlike the original HMT in the WRDA, the three-fold increase in the tax rate was not necessary in order to obtain agreement of the Administration for authorizing new water projects; the increase was a simple money grab. Like the WRDA, the Revenue Reconciliation Act and OBRA included no regulation of shippers. None of the congressional reports give any substantive reason for the need to increase the tax, other than increasing revenues or lowering the deficit. *See*, H.R. Rep. No. 881, 101st Cong., 2d Sess., at 288 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 2017, 2290; H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess., at 1055 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 2374, 2760. Note that in the OBRA, the clause providing for the increase in the HMT was included in Title XI, "Revenue Provisions," and not in Title X, "Miscellaneous User Fees and Other Provisions." P.L. 101-508, 104 Stat. 1388-385, -400, -436. The HMT rate increase was passed along with other deficit reduction items, an indication of the effect that Congress intended the rate increase to have.

The increase in the HMT tax rate validates the Framers' suspicions of government taxation of exports. Once such taxes are allowed, they will inevitably increase. The Export Clause is meant to protect against such taxes, no matter how small. Despite the Government's arguments and some of the statements in the legislative history to the WRDA, the HMT was meant as a "revenue enhancer" from the very beginning. The legislative history of the OBRA shows that the trebling of the HMT rate was clearly intended to provide "revenue

reconciliation" as a "user-related tax", thereby providing meaningful deficit reduction. However, while deficit reduction is a laudable goal, the Export Clause prohibits revenue-raising taxes from being placed on exported goods.[5]

That the HMT is a revenue measure, and not a fee-for-service, can also be seen by review of the collections and expenditures made from the Harbor Maintenance Trust Fund ("HMTF"). As shown in the following charts, the trust fund operates at a significant annual surplus. Revenues increased (or are projected to increase)[6] in the years 1991-2001 at the rate of 11 percent, while expenditures will increase by only 4.05 percent. The Annual Report information is found on the charts entitled "HMTF Balance Sheet 1991-2001" and "HMTF Annual Accumulated Surplus 1991-2001". Following those charts are two similar charts showing projected increases in the trust fund at the historical (11% and 4.05%) rates of

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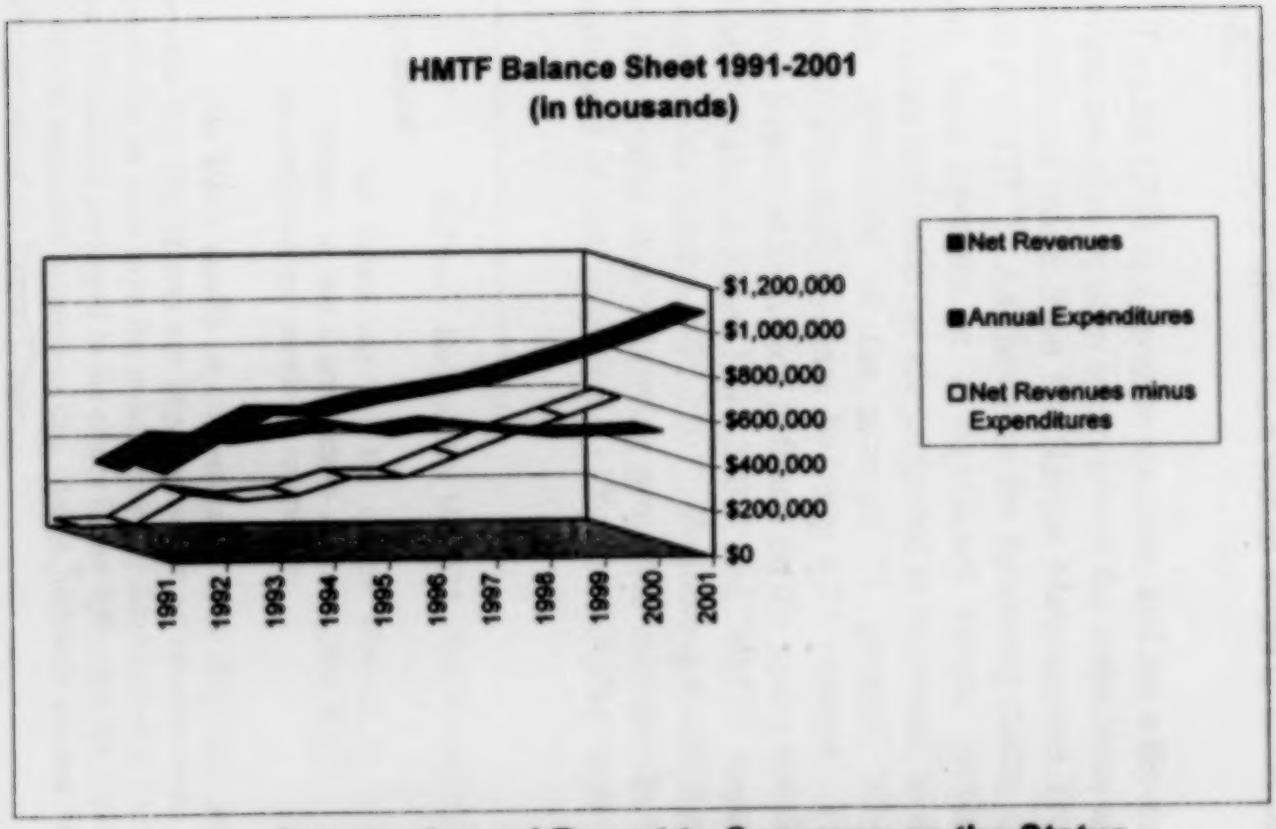
[5] In *Pace v. Burgess*, 181 U.S. 372, 375-76 (1876), the Court stated:

> . . . we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to.

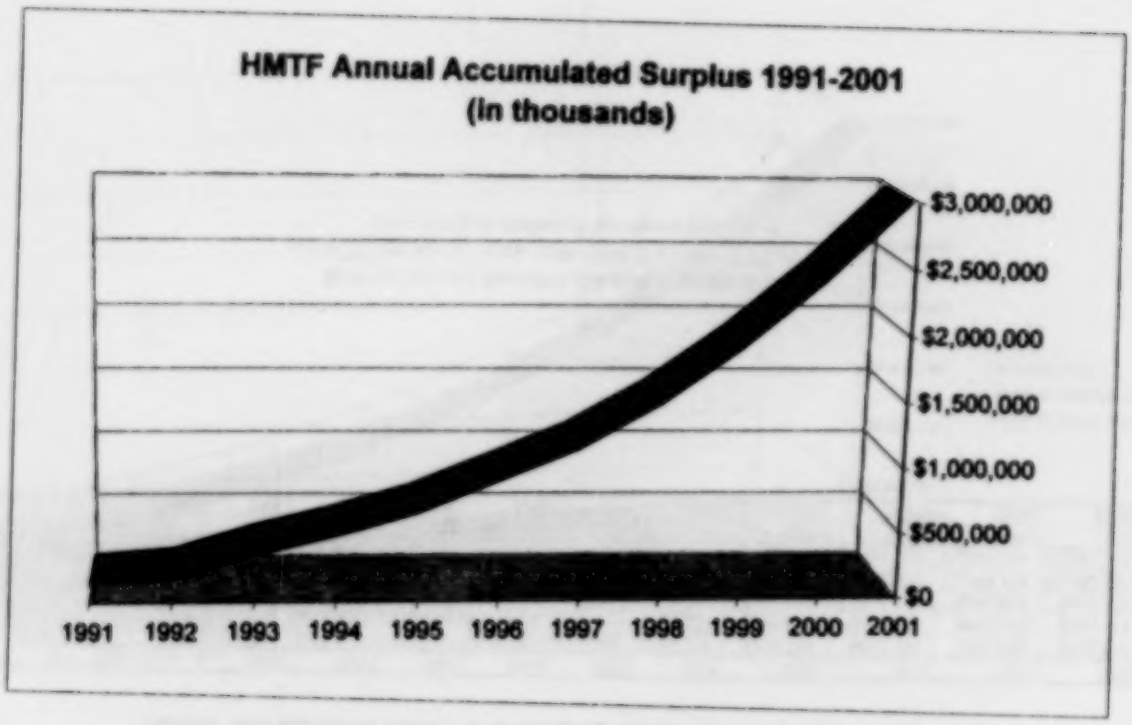
The HMT should be differentiated from the *Pace* charge because that charge was not imposed on an *ad valorem* basis. It should also be clear from the points raised by Respondent as well as the information portrayed in the charts found *infra*, that the HMT is in fact an excessive revenue-raising charge, and does amount to an infringement of the Export Clause.

[6] All 1991-2001 HMTF information is taken from the Annual Report, at 7-8.

increase. These charts demonstrate that the trust fund is seriously out of balance, and is heavily skewed toward increasing revenues, in the absence of any anticipated increases in future harbor maintenance expenditures.



Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8.



Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8.

Harbor Maintenance Trust Fund Balance Sheet 1991-2001 (in thousands)

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Net Revenues	$395,501	$531,080	$650,722	$648,181	$700,891	$736,137	$776,191	$843,190	$912,788	$993,812	$1,085,419
Annual Expenditures	$352,960	$482,944	$498,376	$497,108	$531,082	$494,834	$632,686	$504,016	$480,878	$485,478	$494,578
Net Revenues minus Expenditures	$42,541	$48,136	$152,346	$149,085	$169,809	$244,303	$246,503	$339,174	$431,910	$508,134	$590,841
Beginning Balance	$30,254	$72,795	$120,931	$303,277	$451,385	$621,194	$865,497	$1,112,000	$1,451,174	$1,883,084	$2,391,218
Annual Carry-over Surplus	$72,795	$120,931	$303,277	$452,362	$621,194	$865,497	$1,112,000	$1,451,174	$1,883,084	$2,391,218	$2,982,059
Revenues as Percent of Expenditures	111%	109%	129%	123%	124%	133%	132%	140%	147%	151%	154%
Annual Surplus as Percent of Revenues	16%	25%	47%	70%	89%	117%	143%	172%	206%	241%	275%

Source: Annual Report to Congress on the Status of HMTF for Fiscal Years 1995 1996 (July 16, 1997), at 7-8; percentages derived from those figures.

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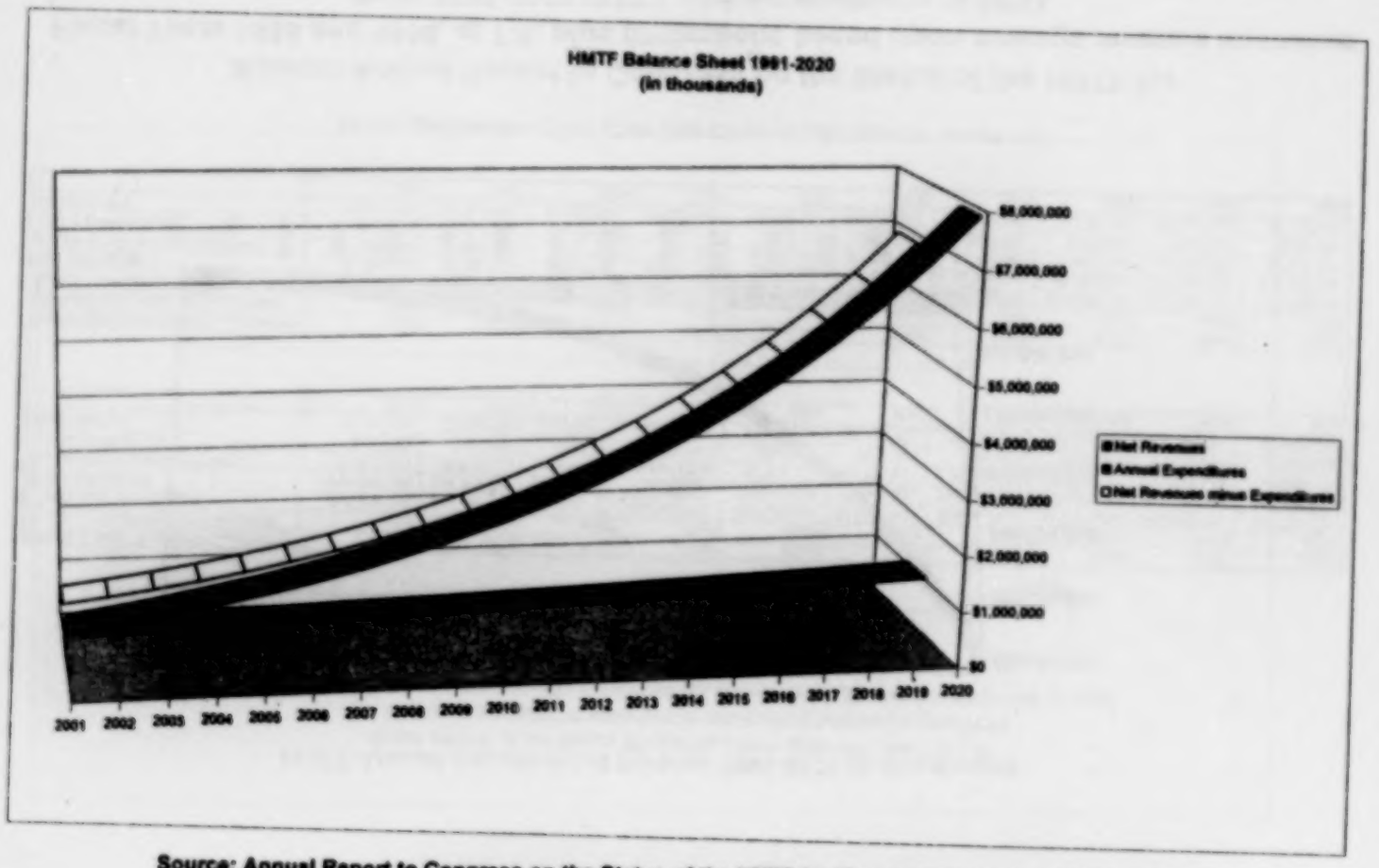
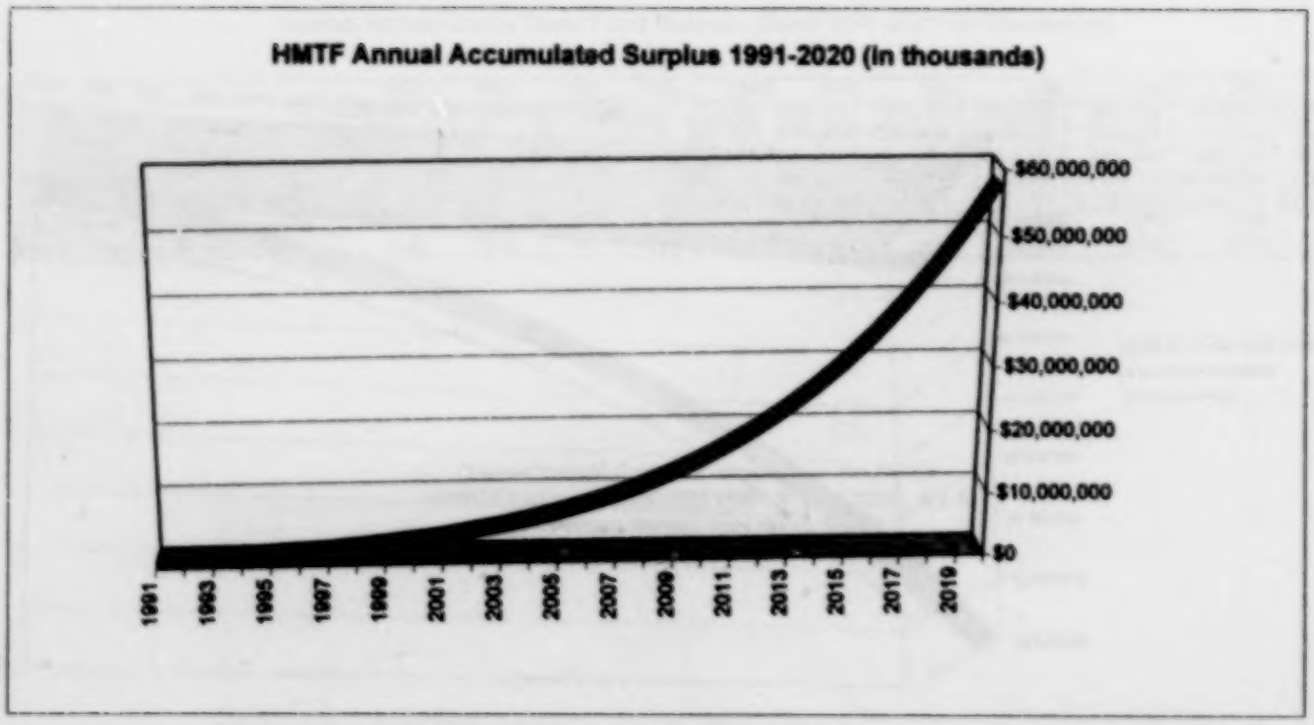


Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8, plus projections based upon average revenue increases from 1991-2001 (11%), and expenditures (4.05%).

17



Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8, plus projections based upon average revenue increases from 1991-2001 (11%), and expenditures (4.05%).

Harbor Maintenance Trust Fund Balance Sheet 2001-2020 (in thousands)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Net Revenues	$1,085,419	$1,204,831	$1,337,381	$1,484,512	$1,647,931	$1,829,117	$2,030,340	$2,253,710	$2,501,057	$2,776,676
Annual Expenditures	$494,578	$514,589	$536,410	$557,574	$579,814	$603,098	$627,487	$652,955	$679,270	$706,794
Net Revenues minus Expenditures	$590,841	$690,242	$801,970	$927,438	$1,068,117	$1,226,051	$1,402,869	$1,600,689	$1,822,387	$2,070,122
Beginning Balance	$2,391,218	$2,982,059	$3,672,301	$4,474,271	$5,401,710	$6,469,827	$7,695,878	$9,098,747	$10,699,436	$12,522,104
Annual Carry-over Surplus	$2,982,059	$3,672,301	$4,474,271	$5,401,710	$6,469,827	$7,695,878	$9,098,747	$10,699,436	$12,522,104	$14,592,226
Revenues as Percent of Expenditures	154%	157%	160%	162%	165%	167%	169%	171%	173%	179%
Annual Surplus as Percent of Revenues	275%	309%	339%	384%	393%	421%	448%	479%	501%	529%

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Net Revenues	$3,082,374	$3,421,481	$3,797,868	$4,215,719	$4,679,511	$5,194,327	$5,765,760	$6,400,191	$7,104,200	$7,885,776
Annual Expenditures	$736,361	$766,194	$798,091	$830,271	$863,764	$898,653	$932,932	$970,880	$1,009,998	$1,050,819
Net Revenues minus Expenditures	$2,347,023	$2,655,377	$3,001,834	$3,387,449	$3,817,727	$4,297,674	$4,832,848	$5,429,421	$6,094,202	$6,834,957
Beginning Balance	$14,592,226	$16,939,250	$19,595,627	$22,597,461	$25,984,909	$29,802,637	$34,100,311	$38,933,159	$44,362,580	$50,456,832
Annual Carry-over Surplus	$16,939,250	$19,595,627	$22,597,461	$25,984,909	$29,802,637	$34,100,311	$38,933,159	$44,362,580	$50,456,832	$57,291,789
Revenues as Percent of Expenditures	176%	178%	179%	180%	182%	183%	184%	186%	189%	187%
Annual Surplus as Percent of Revenues	550%	573%	595%	616%	637%	659%	679%	693%	710%	727%

Source: Projections from average increases for revenues (11%) and expenditures (4.05%) for period 1991-2001, as reported in the Annual Report to Congress of the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8.

CONCLUSION

Because the HMT is an *ad valorem* tax imposed upon exported cargo, it falls squarely within the prohibition of the Export Clause. The Framers understood that imposition of any such tax would lead to inevitable pressure for an increase in the tax rate. They also understood that exports should be promoted by government, not discouraged by taxation. We believe that the Framers would reject the HMT as soundly as they rejected the then-current export taxes imposed by many states before the enactment of the Constitution, and that this Honorable Court should do the same.

Respectfully submitted,

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